उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

HIGH COURT OF CHHATTISGARH BILASPUR

CRIMINAL APPEAL NO. 618 of 2005

APPELLANT (IN JAIL) — Chima Deo @ Jeetu @ Jitendra Sahu, aged 18 years, S/o. Sudarshan Sahu, Occupation – Riksha Chalak, R/o Danitola Ward Dhamtari, P.S. & Distt. Dhamtari (C.G.)

VERSUS

RESPONDENT — The State of Chhattisgarh Through P.S. City Kotwali, Dhamtari, Distt. Dhamtari (C.G.)

Present:
Mr. D.N. Prajapati, counsel for the appellant.
Mr. Arun Sao, G.A. for the State/respondent.

JUDGMENT

(11th October 2007)

Dhirendra Mishra, J.

This criminal appeal is directed against the judgment of conviction and order of sentence dated 30.6.2005 passed in S.T. No. 371/04 whereby learned Additional Sessions Judge, Dhamtari, has convicted the appellant under Sections 376 (2)(f) of the Indian Penal Code and sentenced him to undergo RI for ten years, pay a fine of Rs.200/- and in default of payment of fine to undergo additional RI for one month.

2. Case of the prosecution, in brief, is that on 24.8.2004 at about 6.30 p.m. the appellant committed rape with the prosecutrix, aged about 4 years. At that time her mother

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 2	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

Lalitabai (PW-1) had gone to work. When she returned the prosecutrix complained pain on her private part. When the complainant saw, there were bloodstains over underwear of the prosecutrix. Thereafter, the prosecutrix informed her that the accused has raped her. Report to this effect was lodged in Police Station – City Kotwali, Dhamtari by Lalitabai (PW-1) on 25.8.2004 at 22.30 hours.

3. During investigation bloodstained underwear of the prosecutrix was taken into possession vide Ex.P/2. Underwear of the accused was taken into possession vide Ex.P/4. Medico Legal Report of the accused is Ex.P/10-A. The prosecutrix was sent for medical examination to District Hospital, Dhamtari where Dr. (Smt.) Asha Tripathi (PW-10) examined her and gave report of Ex.P/14. In reply to the query of Ex.P/12, Dr. Tripathi gave report of Ex.P/12-A. After completing investigation charge sheet was filed in the Court of Chief Judicial Magistrate, Dhamtari and the same was received on transfer by learned Additional Sessions Judge, for trial.

4. During trial the prosecution examined 11 witnesses in all. Thereafter, statement of the accused was recorded, in which he denied the circumstances appearing against him in the prosecution case and stated that he has been falsely implicated on account of animosity and the prosecutrix has been tutored by her mother. He also examined his mother

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 3	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश
	Chandrikabai as defence witness Court after hearing counsel for the and sentenced the accused/ paragraph 1 of this judgment.	No. 1. However, learned trial respective parties, convicted appellant as mentioned in
	5. Learned counsel for the prosecutrix is a tutored witness. that because of rape allegedly committed by the accused, the prosecutrix sustained injuries over her persons and as a result, there was bleeding from her private part, which stained the underwear worn by the prosecutrix. However, there is no evidence available on record that the underwear of the prosecutrix seized during investigation was stained with blood or she sustained any injury over her private part. Her version is not corroborated from the statement of independent witnesses also. Therefore, in view of the discrepancy present in the case of the prosecution, the Court below ought to have accepted defence of the appellant that he has been falsely implicated on account of quarrel between his mother and mother of the prosecutrix, as is reflected from the statement of defence witness Chandrikabai. However, the trial Court has completely ignored the statement of defence witness Chandrikabai.	appellant submits that the Case of the prosecution is

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मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 4	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

6. On the other hand, learned counsel for the State/respondent supported impugned judgment of the trial Court.

7. I have heard learned counsel for both the parties and have perused the impugned judgment as also the evidence available on record.

8. Conviction of the appellant is based on the statement of the prosecutrix (PW-2), her mother Lalitabai (PW-1) and her father Shishupal (PW-3). The trial Court has also relied upon the observation of Dr. (Smt.) Asha Tripathi (PW-10) that there was reddishness over vulva of the prosecutrix, therefore, there is possibility of partial penetration.

9. The age of the prosecutrix (PW-2) has been assessed five years by the trial Court. She has stated that at the time of incident the accused was putting on full-pant, he came to her house, took her on the terrace and raped her and asked her not to disclose this fact to her mother. She has denied the suggestion that she has given the statement on being tutored by her mother. She has also denied that Pintu and Khilesh were playing with her and stated that at the time of incident nobody was playing with her. This suggestion has also been denied that she sustained the above injuries due to fall from the staircase and the accused did nothing with her.

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मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 5	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश
	10. PW-1 Lalitabai, mother of the prosecutrix, has stated that when she returned from work at 7.00 p.m., she saw that there was blood stain on the underwear of the prosecutrix. On enquiry, the prosecutrix told her that the accused took her on the terrace, removed her underwear and inserted his male organ into her vagina and therefore, her underwear is stained with blood. PW-3 Shishupal, father of the prosecutrix, has stated that on return from his duty his wife informed him that the accused has raped his daughter and thereafter, they went to lodge the report. In cross-examination he has stated that his daughter also told him that the accused raped her on the terrace. PW-4 Narendra Kumar Sahu has stated in his examination-in-chief that Lalitabai came out of her house and cried that the accused has raped her daughter. However, in the cross-examination he has stated that Lalitabai did not tell him anything. Similar is the statement of PW-5 Janakram. 11. PW-10 Dr. (Smt.) Asha Tripathi, has examined the prosecutrix on 26.8.2004 at about 12.20 hours and given the report of Ex.P/14. She has stated that during examination the prosecutrix did not complain pain in any part of her body and there were no marks of injury on her person. At the time of examination of her private part, her thighs could be spread easily without any pain. Her hymen was intact, there was no injury over her private part, a slide of vaginal smear was	

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मामला क्रमांक ..... सन् 200

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 6	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश
	prepared and she has opined that partial penetration was possible. However, there was no injury on any portion of her body. In reply to the query dated 29.9.2004, she has reiterated her earlier opinion regarding absence of any injuries and stated that there was some reddishness over vulva, but hymen was intact and thus, she has opined that partial penetration was possible. She has further clarified that the reddishness was also possible because of etching or infection. 12. If the statements of the prosecutrix and her mother are closely scrutinized, it is observed that the prosecutrix in her examination-in-chief has described the incident by using the word "आरोपी ने मुझे चोद दिया". However, looking to the age of the prosecutrix, it is very difficult to accept that she would ordinarily understand the meaning of the word, which she was using in her deposition and in these circumstances, the defence of the appellant that the prosecutrix is a tutored witness, appears to be probable. The prosecutrix does not utter a word in her deposition that because of act of the accused she suffered pain in her private part or any portion of the body as claimed by her mother. On the contrary, if the act as alleged by the prosecution is committed upon a girl of 4-5 years, the only probable reaction of the victim would be of pain and weeping. Similarly, her mother has also stated that when she returned from work, she saw that underwear of the prosecutrix	

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मामला क्रमांक.....**सन् 200**

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश 7	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश
	was stained with blood but she nowhere states that the victim was complaining of any pain or she was weeping. The underwear of the prosecutrix has been seized during investigation, however, there is no evidence available on record that the same was in fact forwarded to the Forensic Science Laboratory for chemical examination as that would have been the best evidence to establish the allegation of the witnesses that the prosecutrix sustained injuries as a result of which there was bleeding, which stained her underwear. Apart from this, the report was lodged on the following day and that too, at about 22.30 hours In the examination-in-chief the complainant has stated that after return from the work, she learnt about the incident and thereafter, she called her husband Shishupal who immediately came and she narrated the incident to him also. However, in the cross-examination she has stated that it is correct to say that when she returned home, her daughter did not narrate about the incident herself. It is also correct to say that in the morning also her daughter did not disclose about the incident. Thus, she is giving contrary versions with respect to time and date when the prosecutrix narrated the incident to her. 13. The trial Court has based conviction of the appellant on the testimony of the prosecutrix and also on the statement of Dr. (Smt.) Asha Tripathi (PW-10), who has mentioned in her	

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आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश ९	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

report that there was reddishness in vulva of the prosecutrix and there is possibility of slight penetration. However, the doctor has further clarified that reddishness was also possible because of infection or etching. There is categorical opinion by the doctor that the prosecutrix did not complain pain on any portion of her body and even after spreading her legs for examination of her private part, she was not complaining pain.

14. In the matter of **Aman Kumar and another Versus State of Haryana** (2004) 4 SCC 379 in Para 7 it has been observed thus:-

> "Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus, a relatively less forceful penetration may not give rise to injuries ordinarily

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश ७	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

possible with a forceful attempt. The anatomical feature with regard to hymen which merits anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora, are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further examination of the female for marks of injuries elsewhere on the body forms a very important piece of evidence."

15. It is settled law that conviction of the accused could be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration.

16. In the light of above principle of law, in the facts of the present case it is evident that the girl is aged five years, there is no medical evidence of any injury, tenderness or pain over her libia minora or majora, therefore, conclusion of the trial Court that slight penetration was possible, based on the observation of the doctor who examined the prosecutrix regarding presence of reddishness over her vulva, is not justified particularly when the doctor has herself admitted that cause of reddishness may be because of infection or etching and her opinion regarding slight penetration is based on guessing. Moreover, in view of the discrepancies pointed out hereinabove, defence of the appellant as reflected in the statement of defence witness Chandrikabai, mother of the appellant, who has stated that her

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आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश /10	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश
	son is a rickshaw puller, she has inimical relationship with Lalitabai and on this account there were quarrels between the two on 3-4 occasions, she used to forbade her son to carry Lalita on his rickshaw free of cost, which was not liked by Lalitabai and because of this the appellant has been implicated in a false case, may be probablised. 17. For the aforesaid reasons, this Court is of the considered opinion that the prosecution has not been able to prove its case beyond reasonable doubt based on the material available on record and the trial Court was not justified in convicting and sentencing the appellant under Section 376(2)(f) of the IPC. 18. In the result, the appeal succeeds. Impugned judgment of the trial Court convicting the appellant under Section 376(2)(f) of the IPC and imposing sentence thereon, is set aside. The appellant is acquitted of the above charge. He is directed to be set at liberty forthwith, if not required in any other case. **Sd/-** **Dhirendra Mishra** **Judge**	

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